No. 1064 115

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Appellant,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN,

Appellee.

(Case No. 3)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Appellant,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN,

Appellee.

(Case No. 4)

BRIEF OF APPELLANT IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM.

R. M. KIESEL,
HERBERT H. NAUJOKS,
Counsel for Appellant,
State Farm Mutual Automobile Insurance Company.

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(For Jurisdictional grounds see Statement of Jurisdiction R. 13-38) 1

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The issue arises as result of a ruling of the Supreme Court of Wisconsin holding that membership fees cannot be charged by a mutual insurance company in Wisconsin 2

(Membership fee used by appellant is an initial payment required by appellant of each applicant to pay acquisition and investigation expenses of securing the new member. It is payable but once in the lifetime of each insured and is collected in addition to the premium. For detailed description of membership fee see Record 189-193.) 2

The company abandoned the membership fee in Wisconsin and adopted the straight premium plan 3

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The appellee refused to recognize this change claiming that the appellant was required under the rulings of the Supreme Court of Wisconsin to set up an unearned premium reserve in Wisconsin on all sums collected in the various states in which the appellant does business and to include as a premium both the sums collected and denominated premiums in those states and those

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Thirty-nine other states in which appellant does business however, respect the terms of the membership plan and do not require the return of membership fees or an unearned premium reserve upon such fees because under the membership contract, these fees are not returnable under any circumstances 3

The Supreme Court sustained this claim of the appellee in this case. (See *State Farm Mutual Automobile Ins. Co.* v. *Duel*, 244 Wis. 429 (Adv. Op.).) Accordingly it held that appellant could not be licensed in Wisconsin unless it treated as a liability in other states what those states specifically held and the contract in the states provide is not a liability 4

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(Case No. 4) *Appellee.*

BRIEF OF APPELLANT IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM.

This brief is filed in reply to appellee's brief in support of his motion to dismiss or affirm. The jurisdictional grounds in support of this appeal were discussed at length in our statement of jurisdiction (R. 13-38). Therefore, we here address ourselves principally to reply to appellee's brief supplemented by some elaboration of our own brief in order to emphasize that the jurisdiction of the court here is clear and should be exercised.

I. THE NATURE OF THE CASE AND THE RULING BELOW

A. History of case and effect of ruling below.

The issue arises in this manner: The Wisconsin Supreme Court held (*Duel* v. *State Farm Mutual Automobile Ins. Co.*, 240 Wis. 161 (1942)), that Section 201.18 Wis. Stats. (here at issue) prohibited in Wisconsin the use of the membership fee,—an initial payment required by appellant of each applicant to pay acquisition and investigation expenses of securing the new member and payable but once in the lifetime of each insured and collected in addition to the premium, (for a more detailed description of the membership fee, its purposes and method of operation, see Complaint, Case No. 4, R. 189-193),—because under Wisconsin law as determined by the Supreme Court of Wisconsin for the first time in that case; a premium included all items of expense, whether preliminary to insurance or otherwise, by which insurance was finally acquired and performed. The court arrived at this conclusion because according to its concept of the purpose of the unearned premium reserve, that reserve was to measure the liability of the company to repay premiums collected in advance, should it become necessary for any reason to terminate the contract before its expiration date or to buy reinsurance in some other company. The court therefore held that the following provision of appellant's policy contract:

> "The membership fees set out in this policy *which are in addition to the premium* are not returnable, but entitle the named insured to insure one automobile for the coverages for which said fees were paid so long as this company continues to write such coverages and the insured remains a desirable risk" (R. 83, 190) (Emphasis ours).

was inconsistent with the Wisconsin law and could not be used in Wisconsin. The appellant accepted this construction of Section 201.18 Wis. Stats., (here at issue) and thereupon abandoned the use of the membership fee plan in Wisconsin (R. 77, 182).

Thereafter in Wisconsin it operated only on the straight premium plan; that is, the premium collected was increased after the decision above referred to so as to include as a single item acquisition, investigation and other expenses as well as all ordinary incidentals of a premium, and the same amount was collected in the initial and renewal periods of each policy. The entire sum collected under this plan was designated a premium and unearned premium reserves were set up on such sums as required by Section 201.18, Wis. Stats., as construed by the decision of the court. The appellee, however, refused to recognize this change as compliance with the Wisconsin statute as so construed by the court and claimed that in order to qualify for admission to Wisconsin the appellant was required to set up an unearned premium reserve in Wisconsin on all sums collected (both those collected on premiums and those collected on membership fees) in the other thirty-nine states in which the appellant does business.

All of these thirty-nine other states respect the terms of the appellant's policy contract above quoted, that the membership fees are not a part of the premium, that they are not returnable if the contract of insurance is cancelled before maturity and that unearned premium reserves in such states are only required and refund of premium in the event of cancellation of the insurance contract is only required of sums collected and denominated in those states as premiums. While the membership fee plan is not used in three of these states, nevertheless they accord the same effect to the contract in other states as do the states where the membership fee plan is used. Aside from Wisconsin,

the uniform interpretation is that the membership fees collected by the appellant in its almost nationwide business is that the membership fees are not premiums and are not to be so considered in computing reserves or for any other purpose. (R. 82, 140, 143-144, 147-169, 189, 192. See admissions of Answer, 221-223.)

State Farm Mutual Automobile Ins. Co. v. *Carpenter*, 87 Pac. (2d) 867 (Cal. App. 1939; Hearing denied by Cal. Sup. Ct. on April 21, 1939);

Kreifels v. *State Farm Mutual Automobile Ins Co.*, 62 N.D. 667, 244 N.W. 880 (1931);

Opinions of various State Insurance Departments and Attorneys General (R. 147-169).

Thus appellee (and his claim was sustained by the Supreme Court of Wisconsin in the cases now before this court. See *State Farm Mutual Automobile Ins. Co.* v. *Duel*, 244 Wis. 429 (Adv. Op.)) claims that Wisconsin has the right to refuse a license to appellant because it does not treat as a premium in computing its unearned premium reserve, sums collected by it as membership fees in states where such sums so collected are not premiums and not returnable either under the contract between the company and its insured or under the law of the state where the contract is issued.

Wisconsin thus seeks to require appellant to compute and maintain an unearned premium reserve which is neither contractually or by legal interpretation the true measure of the company's unearned premium reserve liability. It seeks to force the company to treat as if subject to possible return to its policyholders in the thirty-six states where the membership plan is used, a sum which under the contracts of the company are not returnable and for which no liability, either present or potential, does or can exist.

On the other hand, parties to the insurance contracts executed in the foreign states recognizing the membership fee as no part of the premium acquired rights beyond the borders of Wisconsin. Those contracts are neither made nor are they to be performed in that state. The company's liability for unearned premiums on those contracts became fixed by the laws of those states. The amount paid as a membership fee is no part of that liability and bears no relationship to it whatever under those laws. What Wisconsin here seeks to do is to impress upon those contracts a burden not contracted for, namely, the creation of a reserve for a liability that does not exist in those states *and therefore cannot exist in Wisconsin*, and that wholly without any relation to anything done or to be done within its borders, quite similar to that which was condemned as violative of due process in *Home Ins. Co. v. Dick*, 281 U.S. 397, 407.

In 1942, the company collected membership fees of $1,630,206.39 and premiums of $24,015,786.12. In accordance with its established practice approved by all states except Wisconsin, it used only the amount collected as premiums as the base from which to compute its unearned premium reserve. It excluded the amounts collected as membership fees from all unearned premium, reserve calculations because, as indicated above, in the thirty-six states there is no liability for the return of the membership fees. Appellee would require the company to include the membership fees collected in 1942 with those premiums as the base from which it must compute its unearned premium reserve liability as of December 31, 1942. This would mean that these membership fees which were earned by the company and which are the property of the company under its contract, must in part be earmarked and held as a trust fund in the unearned premium reserve. No person who paid any of these membership fees can

be a beneficiary of the trust fund because under his contract no part of the membership fee is returnable to him. No Wisconsin policyholder could have any part of it because he paid no part of it and any liability to return premium to him is already set up because the payments he made as a premium are included in the unearned premium reserve carried by the company.

Thus is presented the question whether Wisconsin and its citizens can possibly have any interest in requiring such an unearned premium reserve liability on membership fees collected in thirty-six other states which hold that such fees are not premiums, are not returnable, and do not create a liability.

B. The case presented is one where the court must apply "settled legal principles" to the "precise circumstances" of this case. As such, it is clearly one which requires the court to assume jurisdiction in order to accord to appellant a complete hearing of the issue presented.

Settled doctrine dictates that a motion to dismiss or affirm will not be granted unless the contentions of appellant are "clearly not debatable and utterly lacking in merit,"

Hamilton v. *Regents*, 293 U.S. 245, 258;

or unless those contentions "upon mere citation of our decisions * * * may be put aside as not requiring further consideration."

Alton R. Co. v. *Illinois Comm'n.*, 305 U.S. 548, 550;
Chesebro v. *Los Angeles Co. Dist.*, 306 U.S. 459, 463.

Because the case "involves application of settled legal principles to the precise circumstances of this case"

Northwest Airlines, Inc. v. *Minnesota*, (Decided May 15, 1944) U.S. Law Week, Vol. 12, No. 44, p. 4370,

and "complicated problems raised by the interplay of federal and state power"

McLeod v. *J. E. Dilworth Co.*, (Decided May 15, 1944) U.S. Law Week, Vol. 12, No. 44, p. 4378,

it is necessary that the facts be clearly understood. We have here "a new phase of an old problem."

Northwest Airlines, Inc. v. *Minnesota*, (May 15, 1944) U.S. Law Week, Vol. 12, No. 44, p. 4370,

presenting a question which cannot be said to be "clearly not debatable and utterly lacking in merit," or one which "upon mere citation of our decisions * * * may be put aside as not requiring further consideration."

In other cases involving claimed authority by one state to regulate activities of foreign insurance corporations in other states, this court assumed jurisdiction to settle the problems there involved. It did so by applying accepted legal principles to "precise circumstances."

Hoopeston Canning Co. v. *Cullen*, 318 U.S. 313 (1943);
Osborn, et al. v. *Oslin, et al.*, 310 U.S. 53 (1940);
Fidelity and Deposit Co. v. *Tafoya*, 270 U.S. 426 (1926).

C. The premise of the Appellee on which is based his Motion to Dismiss or Affirm is not supported by the decision of the Wisconsin Supreme Court.

We appreciate that this is not the place to argue merits, but jurisdiction only. Nevertheless, it may be of assistance to the court to point out briefly, in summary, the error of appellee's basic assumptions.

The premise of appellee's motion to dismiss or affirm is that the Wisconsin court held that Section 201.18 of Wisconsin Statutes prescribes "a uniform minimum yardstick of over-all solvency that is used for comparative purposes in testing financial soundness and responsibility" (p. 9). Appellee asserts that "such reserve requirement is well within state power is definitely established by *Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313" (p. 11). The Wisconsin Supreme Court decided the case upon no such premise. It said:

> "In our opinion, this section, (Section 203.12) in connection with those relating to unearned-premium reserves (Section 201.18), indicate a plain statutory purpose that the costs of furnishing insurance shall be collected by a charge known as a 'premium'; that reserves shall be set up against this premium, and that specified portions of the premium indicated in the statutory tables shall be returned as unearned upon cancellation of the insurance.
>
> "It is impossible to repel the implication from all this that the amount exacted to cover the cost of insurance shall buy insurance protection which may be so measured that the unearned portion of the premium deposit may be ascertained and returned."
>
> *Duel* v. *State Farm Mutual Auto. Ins. Co.*, 240 Wis. 161, 177-178.

To that court "over-all solvency" was immaterial:

> "The Statute specifically designates the amount of this (unearned premium) reserve. It requires the designated amount to be maintained wholly independent of the company's solvency in the sense that its assets equal its over-all liabilities. No matter by how much the assets of the company exceed these liabilities, unless the amount designated by the statute is set up as the reserve required by the statute, it cannot have a license to do business in this state

and it cannot do business in this state without a license authorizing it to do it."

> *State Farm Mutual Auto. Ins. Co.* v. *Duel*, 244 Wis. 429 at 434 (Adv. Op.).

It is not correct to speak of Section 201.18 Wis. Stats. as a general solvency statute, as "a uniform minimum yardstick of over-all solvency". It is nothing of the sort. It is a statute designed to secure an adequate reserve to cover the *unearned premium* liability of the company to its policyholders and nothing else.

> "The unearned premium reserve is sometimes called the reinsurance reserve, or the amount necessary for reinsuring the risks, but this is not the main reason for holding the reserve. The main reason for the reserve is to maintain in trust for the exclusive right of the policyholders, a sum equal to the unearned part of the premiums already collected." (*Crobaugh, Handbook of Insurance*, p. 1143 (1931)).

This is so because "the statute is so *written* (it took a court decision to determine that premium included membership fee; (*Duel* v. *State Farm*, 240 Wis. 161)) and as so *written it must be executed.*" *State Farm Mutual Auto Ins. Co.* v. *Duel*, 244 Wis. 429 (Adv. Op.) That court was not concerned "with the probability of the company's meeting the obligation to refund unearned premiums out of its surplus or its contingent reserve or other assets". It was concerned only "with the carrying out of the legislative intent evidenced by" the statute.

The Capital and Surplus Statutes (Wis. Stats. 201.03 (9), 201.32 (3), see appendix, p. 13 for text of statutes) are the only ones designed to assure over-all solvency. No claim is made that appellant does not conform to those statutes No question is or can be raised as to appellant's solvency. Appellant as of December 31, 1942 had, after

providing for all liabilities, a voluntary and unassigned contingent reserve of $4,000,000.00 (R. 187), in addition to a surplus of $8,994,982.39 (R. 187).

D. The Wisconsin Court gave only casual consideration to the constitutional questions fully presented to it.

That court was unable to see how appellant's "constitutional rights are in some way interfered with" by the refusal to relicense appellant.

> "In view of the fact that the company is only required to do what every other corporation, whether domestic or foreign, and every other person or association that wants to do a like insurance business in Wisconsin is required to do * * *"
>
> *State Farm Mutual Automobile Ins. Co.* v. *Duel*, 244 Wis. 429 at 434,5 (Adv. Op.).

The Wisconsin court's opinion failed to cite a single case of this court although relevant authorities of this court were cited in the briefs. It is apparent that Wisconsin begged the question here. The constitutional question here was not one of equal protection of the laws. It was one of arbitrary, unreasonable and unlawful action in a field in which Wisconsin had no interest. It was likewise one of impairment of contract and failure to accord full faith and credit to the decisions and contracts of other states. Whether the statute as construed went "beyond any legitimate interest of the state" (Holmes, J., in *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 435), or whether as construed it affected Wisconsin "interests as to give" Wisconsin "the power it claims" (Black, J., in *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, 316) was not factually investigated or considered by that court. One can't even say that the court assumed *subsilentio* that Wisconsin gained something by the construction it placed upon that statute.

E. Had the Wisconsin Court applied the relevant facts to the accepted principles of constitutional law, it would have become evident Wisconsin had no interest to redefine what were premiums in thirty-six states which had their own definition.

Where is Wisconsin's legitimate interest in all of this? The statute is only designed to assure the discharge of a liability for an unearned premium. What interest do Wisconsin citizens have in requiring the company to set up a reserve when there is no liability for which that reserve might be used.

The company already maintains a sufficient reserve on the business done in Wisconsin and in every other state to cover the total unearned premium liability of the company in all states. Wisconsin cannot and does not dispute this proposition.

F. The Wisconsin Court's construction of Section 201.18, Wis. Stats., is in direct conflict with the principles laid down in the Hoopeston and similar decisions of this court.

The principles laid down in the cases of *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, and *Osborn* v. *Ozlin*, 310 U. S. 53, are directly violated by the Wisconsin court's construction of Section 201.18, Wisconsin Statutes, as applied to appellant. In each of those cases a legitimate state interest was present: solvency and convenience in the former (318 U. S. 313, 318); service and lessening of "risks of casualty and loss" in the latter (310 U. S. 53, 64). In the latter, this court, through Mr. Justice Frankfurter, was careful to point out that what Virginia had done was "very different from the imposition of conditions upon appellants' privilege of engaging in local business which would bring within the orbit of state powers mat-

ters unrelated to any local interests" (p. 65). *That is the very point here.*

At the risk of repetition, we ask, what conceivable local interest does Wisconsin have in requiring the company to create and maintain a reserve for unearned premiums on insurance contracts made and to be performed in other states in excess of the liability agreed upon in those contracts and determined by the laws of those states? With much greater force does the claimed right demand denial when no question is raised as to the company's solvency and it complies with all of Wisconsin's solvency statutes!

If Wisconsin has no "legitimate interest", if its interests are not so affected as to give it "the power it claims", then we have a clear effort by the state of Wisconsin to regulate insurance contracts entered into without that state by giving extraterritorial effect to its statute, an unconstitutional assumption of power whether viewed in the light of due process (*Fidelity & Deposit Co.* v. *Tafoya*, 270 U.S. 426, 434; *Home Ins. Co.* v. *Dick*, 381 U.S. 397, 407), full faith and credit (*Aetna Life Ins. Co.* v. *Dunken*, 266 U.S. 389, 393), or impairment of the obligation of contracts (*Ogden* v. *Saunders*, 12 Wheat 213, 357-369; *Cleveland etc. R.R. Co.* v. *Pennsylvania*, 21 L. Ed. 179, 189).

CONCLUSION

We respectfully submit that appellant has established that this court has jurisdiction in the premises, and, under the particular facts herein, should exercise its jurisdiction.

Respectfully submitted,

R. M. Rieser,
Herbert H. Naujoks,
Counsel for Appellant,
State Farm Mutual Automobile Insurance Company.

APPENDIX

Sec. 201.03, Wis. Stats. Incorporation of Mutual Companies.

* * *

"(9) Any mutual insurance company after January 1, 1943 transacting automobile insurance authorized by subsection (15) of section 201.04 shall maintain a minimum surplus of $50,000 and when such surplus falls below $50,000, the commissioner shall order the surplus replaced and if not so replaced in 15 days, the commissioner may proceed against such company under section 200.08."

Sec. 201.32, Wis. Stats. Foreign Companies; admission.

* * *

"(3) A mutual company shall satisfy the requirements as to solvency and the limitations as to expenses exacted of like domestic companies."